

Assembly Bill No. 403

CHAPTER 360

An act to amend Section 12104 of the Financial Code, relating to check sellers and proraters.

[Approved by Governor August 27, 2004. Filed with Secretary of State August 30, 2004.]

LEGISLATIVE COUNSEL'S DIGEST

AB 403, Correa. Check sellers and proraters: exemptions.

Existing law, the Check Sellers, Bill Payers and Proraters Law, prohibits a person from engaging in certain forms of business for compensation without a license from the Commissioner of Corporations, including selling checks, drafts, money orders, or other commercial paper serving the same purpose. Existing law exempts a nonprofit community service organization from the Check Sellers, Bill Payers and Proraters Law if the nonprofit community service organization meets certain criteria, including that it adopts and implements on a continuous basis policies or procedures of best practices that are designed to prevent theft and misappropriation of funds.

This bill would provide that improper debt management or debt settlement practices include the failure to implement policies that specifically prohibit credit counselors from receiving financial incentives or additional compensation based on the outcome of the counseling process and the failure to disclose or prohibit various other practices. The bill would also require the trust account in which the nonprofit community service organization deposits money received from a consumer to be an account maintained specifically for purposes of administering a debt management plan or debt settlement plan.

The bill would make these provisions inoperative upon the enactment of a statute requiring the licensure and regulation of nonprofit community service organizations providing consumer credit counseling.

The people of the State of California do enact as follows:

SECTION 1. Section 12104 of the Financial Code is amended to read:

12104. A nonprofit community service organization that meets all of the following criteria shall be exempt from any requirements imposed on proraters pursuant to this division:

(a) The nonprofit community service organization incorporates in this state or any other state as a nonprofit corporation and operates pursuant to either the Nonprofit Public Benefit Corporation Law, Part 2 (commencing with Section 5110) of Division 2 of Title 1 of the Corporations Code or the Nonprofit Mutual Benefit Corporation Law, Part 3 (commencing with Section 7110) of Division 2 of Title 1 of the Corporations Code.

(b) The nonprofit community service organization limits its membership to retailers, lenders in the consumer credit field, educators, attorneys, social service organizations, employer and employee organizations, and related groups that serve educational, benevolent, fraternal, religious, charitable, social, or reformatory purposes.

(c) The nonprofit community service organization has as its principal functions the following:

(1) Consumer credit education.

(2) Counseling on consumer credit problems and family budgets.

(3) Arranging or administering debt management plans. “Debt management plan” means a method of paying debtor’s obligations in installments on a monthly basis.

(4) Arranging or administering debt settlement plans. “Debt settlement plans” means a method of paying debtor’s obligations in a negotiated amount to each creditor on a one-time basis.

(d) The nonprofit community service organization receives from a debtor no more than the following maximum amounts to offset the organization’s actual and necessary expenses for the services described in subdivision (c): a one-time sum not to exceed fifty dollars (\$50) for education and counseling combined in connection with debt management or debt settlement services; and for debt management plans, a sum not to exceed 8 percent of the money disbursed monthly, or thirty-five dollars (\$35) per month, whichever is less, and for debt settlement plans a sum not to exceed 15 percent of the amount of the debt forgiven for negotiated debt settlement plans. Nonprofit community service organizations shall not require any upfront payments or deposits on debt settlement plans and may only require payment of fees once the debt has been successfully settled. For purposes of this subdivision, a household shall be considered one debtor. The fees allowed pursuant to this subdivision shall be the only fees that may be charged by a nonprofit community service organization for any services related to a debt management plan or a debt settlement plan.



(e) The nonprofit community service organization maintains and keeps current and accurate books, records, and accounts relating to its business in accordance with generally accepted accounting principles, and stores them in a readily accessible place for a period of no less than five years from the end of the fiscal year in which any transactions occurred.

(f) The nonprofit community service organization deposits any money received from a debtor for the services described in subdivision (c) in a noninterest-bearing trust account in a federally insured state or federal bank, savings bank, savings and loan association, or credit union, which account is maintained specifically for purposes of administering a debt management plan or debt settlement plan. The nonprofit community service organization shall provide the commissioner the following prior to engaging in business in this state and claiming this exemption:

(1) A written notice with the name, address, and telephone number of the bank, savings bank, savings and loan association, or credit union where the trust account is maintained, and the name of the account and the account number. The account information required in this paragraph shall be kept confidential pursuant to the laws governing disclosure of public records, including the California Public Records Act, Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code, and the rules adopted thereunder.

(2) An irrevocable written consent providing that upon the commissioner taking possession of the property and business of the nonprofit community service organization, all books, records, property and business, including trust accounts and any other accounts holding debtors' funds, shall be immediately turned over to the commissioner or receiver appointed pursuant to this division. The consent shall be signed by the nonprofit community service organization and the bank, savings bank, savings and loan association, or credit union where the trust account is maintained. The consent shall be binding upon the nonprofit community service organization and the bank, savings bank, savings and loan association, or credit union, and any objection to it must be raised pursuant to the laws of the State of California and only in the forum in which the proceeding to take possession or appointment of the receiver has been filed. The nonprofit community service organization and the bank, savings bank, savings and loan association, or credit union shall further consent to the jurisdiction of the commissioner for the purpose of any investigation or proceeding under Sections 12105 and 12106 or any other provision of this division. The consent required by this paragraph shall include the name, title, and signature of an official of the bank, savings bank, savings and loan association, or credit union holding



the authority to consent on behalf of that institution, and the name, title, and signature of the chief executive officer or president of the nonprofit community service organization.

(g) The nonprofit community service organization maintains at all times a surety bond in the amount of twenty-five thousand dollars (\$25,000), issued by an insurer licensed in this state. The bond shall be conditioned upon the obligor faithfully conforming to and abiding by the provisions of Section 12104 of the Financial Code, honestly and faithfully applying all funds received, honestly and faithfully performing all obligations and undertakings required under this section, and paying to the state and to any person all money that becomes due and owing to the state or to any person owed by the obligor of the bond.

(h) The nonprofit community service organization reports all of the following to the debtor at least once every three months, or upon the debtor's request, for any debt management plan or debt settlement plan:

- (1) Total amount received from the debtor.
- (2) Total amount paid to each creditor.
- (3) Total amount any creditor has agreed to accept as payment in full on any debt owed by the debtor.
- (4) Any amount paid to the organization by the debtor.
- (5) Any amount held in reserve.

(i) The nonprofit community service organization submits to the commissioner, at the organization's expense, an audit report containing audited financial statements covering the calendar year or, if the organization has an established fiscal year, then for that fiscal year, within 120 days after the close of the calendar or fiscal year.

(j) The nonprofit community service organization submits with the annual financial statements required under subdivision (i) a declaration that conforms to Section 2015.5 of the Code of Civil Procedure, is executed by an official authorized by the board of the organization, and that states that the organization complies with this section. The annual financial statements shall also include a separate written statement that identifies the name, address, contact person, and telephone number of the organization.

(k) The nonprofit community service organization maintains accreditation by an independent accrediting organization, including either the Council on Accreditation or the International Standards Organization, with sector certification.

(l) The nonprofit community service organization does not engage in any act or practice in violation of Section 17200 or 17500 of the Business and Professions Code.

(m) The nonprofit community service organization inserts the following statement, in not less than 10-point type, in its debt



management plan and debt settlement plan agreements: “Complaints related to this agreement may be directed to the California Department of Corporations. This nonprofit community service organization has adopted best practices for debt management plans and debt settlement plans, and a copy will be provided upon request.”

(n) The nonprofit community service organization adopts and implements on a continuous basis policies or procedures of best practices that are designed to prevent improper debt management or debt settlement practices and prevent theft and misappropriation of funds. Failure to do the following shall constitute improper debt management or debt settlement practices, as applicable:

(1) Obtain counselor certification conducted by a nationally recognized third-party certification program that certifies that all of the agency’s counselors receive proper training and are qualified to provide financial assistance prior to performing counseling services in this state.

(2) Disburse funds no later than 15 days after receipt of valid funds, or by a scheduled disbursement date, whichever is the greater amount of time.

(3) Transmit funds utilizing electronic payment processing when available.

(4) Implement an inception date policy, which shall include an agreement that a consumer’s first disbursement pursuant to a debt management plan shall be received within 90 days of agreeing to the debt management plan service. The debt management plan shall include all items described in subdivision (h) and shall be provided to the consumer at the inception date of the plan. A description of best practices of the agency and of the consumer complaint resources shall be issued no later than the first payment date.

(5) Respond to and research any complaint initiated by a consumer within five business days of receipt of the complaint.

(6) Prohibit a policy requiring debt management plan consumers from being required to utilize additional ancillary services.

(7) Provide consumer access to debt management plan services regardless of the consumer’s ability to pay fees related to the debt management plan, lack of creditor participation, or the amount of the consumer’s outstanding debt.

(8) Implement policies that specifically prohibit credit counselors from receiving financial incentives or additional compensation based on the outcome of the counseling process.

(9) Prohibit the practice of paying referral fees to consumers or other third parties who refer new clients to the agency.

(10) Disclose in all written contracts with consumers the portion of funding for the agency that is provided by creditors.



(11) Disclose in all written contracts for debt management plans or debt settlement plans that these plans are not suitable for all consumers and that consumers may request information on other options, including, but not limited to, bankruptcy.

(12) Fully disclose all services to be provided by the agency and any initial and ongoing fees to be charged by the agency for services, including, but not limited to, contributions to the agency.

(13) Prohibit the agency or any affiliate of the agency from purchasing debt from a consumer.

(14) Prohibit the agency from offering loans to consumers involving the charging of interest.

(15) Prominently disclose in written contracts with consumers of any financial arrangement between the agency and any lender or any provider of financial services if the agency receives any form of compensation for referring consumers to that lender or provider of financial services.

(16) Provide professional liability insurance coverage.

(17) Provide the debtor a written individualized evaluation of his or her financial status and an initial debt management plan for the debtor's debts with specific recommendations regarding actions the debtor should take.

(18) Provide the debtor enrolling in a debt management plan a written reliable estimate of the length of time it will take to complete the plan and identifies the total debt owed to each creditor included in the plan, the proposed payment to each creditor, and any fees that would be charged for administering the plan. The estimate shall be provided prior to receipt of the debtor's first deposit.

(o) The nonprofit community service organization provides a copy of the best practices described in subdivision (n) to its debtor, upon request.

(p) The nonprofit community service organization resolves in a prompt and reasonable manner complaints from debtors relating to the organization's debt management plans or debt settlement plans.

(q) The nonprofit community service organization provides written notice to the commissioner within 30 days of dissolution or termination of engaging in the activities of a prorater, as defined in Section 12002.1.

(r) This section shall become inoperative upon the enactment of a statute requiring the licensure and regulation of nonprofit community service organizations providing consumer credit counseling.

